

Delaware Administrative Law Review Task Force
January 5, 2018
9:00 a.m.
Tatnall Building 150 Martin Luther King Jr. Blvd. South Dover, DE 19901

MEETING MINUTES

Task Force Members Present: T. McGonigle, R. Forsten, D. Gibbs, M. Houghton, M. Dunkle, Professor K. Kristl, and D. Atkins.

Task Force Members Absent: Justice Seitz, A. Goldstein, D. Mangler, State Senator B. Townsend, Representative J. L. Mitchell, and J. Adkins.

Public Present: Dmitry Pilipis, John Whitelaw, and Frederick Mitsdarfer.

Call to Order

Thomas McGonigle called the meeting of the Delaware Administrative Law Review Task Force to order at 9:05 A.M.

I. Approval of Minutes from November 15, 2017 Meeting:

Motion to approve minutes made by M. Houghton, seconded by M. Dunkle, and approved 7-0.

II. Subcommittee on Land Use and Real Property – Review Status:

R. Forsten reported that it is likely the subcommittee will make recommendations to require a uniform appeal process throughout the counties and municipalities, whereby all actions, with the exception of re-zonings, would be brought to the Superior Court. M. Dunkle indicated the subcommittee will also likely suggest that the Superior Court would be granted the power to remand cases back to the administrative level, a power the Superior Court lacks currently. R. Forsten stated the subcommittee will likely suggest an amendment to Title 9 and Title 22 of the Delaware Code, which would add a new sections or chapter in both Titles creating this uniform appeal process and removing any inconsistent provisions therein. R. Forsten believe these changes will provided needed clarity around the process and result in efficiencies.

M. Houghton suggested there may be a role for the courts in the context of ensuring the any recommendations the subcommittee might have does not have unintended consequences for the courts.

T. McGonigle suggested that once the subcommittee has the framework of this proposed uniform appeal process solidified, it should be discussed with representatives from the courts, as well as representatives from the counties and municipalities. T. McGonigle requested that with respect to any recommendations the subcommittee might have should incorporate the same judicial standard of review as the draft APA legislation to ensure consistency.

III. State Regulatory Subcommittee – Review Status:

T. McGonigle reported that further information is needed before the subcommittee can offer a recommendation on whether Medicaid cases should be included under the draft APA legislation. The Task Force discussed the importance of understanding and resolving the budget implications of any recommended legislation before the legislation is introduced.

IV. Draft APA Legislation- Review Comments:

T. McGonigle reported that he had received comments from three Task Force members (A. Goldstein, D. Gibbs, and Professor Kristl) on the draft APA Legislation, and the comments were categorized into one document for review, consideration, and hopefully resolution. The Task Force agree to work through the document by comment in an effort to reach a resolution on each point raised.

The Task Force discussed comments relating to Section 10102 of the draft APA Legislation regarding the potential need to amend or add additional defined terms. The Task Force agreed to add “Hearing Examiner” as a defined term to remove confusion with “Hearing Officer”, to add “Hearing Record” as a defined term to remove confusion with “Record”, that “Informal Fact-Finding” should be retained as proposed, and that the existing language of “Agency Action” should be retained for now but may need to be revisited at a later date.

The Task Force discussed comments relating to Section 10112 of the draft APA Legislation regarding the potential need to amend the requirement for Agencies to publish information on their websites. The Task Force agreed that the section should be amended to replace index with a searchable database, but that further discussion with Task Force Member D. Mangler was necessary before a decision on whether this requirement would apply prospectively only or if it would be retroactive. The Task Force discussed comments regarding access to documents during the pendency of Formal Hearing, and agreed that the section should be revised to limit it to regulations and that a parallel section should be created within Subchapter III to address case decisions. The Task Force also discussed and agreed that an appeal from the refusal of an Agency to disclose documents should be decided by the ALJ or Hearing Officer.

The Task Force discussed comments relating to Section 10115 of the draft APA Legislation regarding whether this requirement would be satisfied by the Register of Regulations’ website and the need for continued newspaper notice. The Task Force agreed that the use of newspapers to provide notice should continue, and that this requirement is different than what is provided through the Register of Regulations’ website.

The Task Force discussed comments relating to Section 10118 of the draft APA Legislation regarding whether additional language is necessary to ensure more consistent decisions and judicial review. The Task Force agreed that no further changes should be made.

The Task Force discussed comments relating to Section 10122 of the draft APA Legislation, and agreed to amend the section to remove potential confusion regarding its applicability.

The Task Force discussed comments relating to Section 10125 of the draft APA Legislation regarding the appropriate evidence standard and the use of privileged information. The Task Force agreed that the section should be revised to require strict conformity with the legal rules of evidence and shall exclude all evidence subject to a legal privilege recognized by Delaware courts. The Task Force also discussed comments regarding to the need to carve out situations where health and safety are compromised, especially those similar to the Bradley case. The Task Force agreed that this section should not change the current process created in response to the Bradley case and that language should be amended to explicitly make this section subject to any mechanism created in response to the Bradley case. The Task Force also discussed comments regarding the general timing of hearings and discretion of the Hearing Officer to alter deadlines in expedited cases. The Task Force agreed that this section should be amended to provide minimum time periods between subpoenas and the return date, and to allow the Hearing Officer discretion to adjust deadlines in expedited cases, except in situations where health and safety are compromised, especially those similar to the Bradley case. The Task Force also discussed comments regarding ability of a party to review exculpatory materials and investigative files possessed by the Agency, excluding any privileged information therein, before the Hearing. The Task Force agreed not to amend the section to remove those options. The Task Force also discussed comments regarding confusion and potential issues with service by mail vs electronic service. The Task Force agreed that the section should be amended to provide that electronic service as the default, that parties should be required to make an election (between electronic service or mail service) at the commencement of a case which would provide the other parties with information sufficient to receive the method of service elected, that certificate of mailing should be used when mail service is elected, and that the appeal periods should be based on mailing.

The Task Force discussed comments relating to Section 10128 of the draft APA Legislation regarding whether a quorum should be required to sign a Final Order, and agreed that the section should be amended to make clear that electronic signatures are sufficient to satisfy this requirement.

The Task Force discussed comments relating to Section 10129 of the draft APA Legislation regarding impact of the adoption of the Office of Administrative Hearings on ex parte communications. Generally, situations exist where the Hearing Officer may consult with the agency because the Hearing Officer needed assistance understanding an issue or an area of law. The Task Force agreed that the section should be amended provided that if such a consultation occurs it must be documented and made part of the Hearing Record, and that the other parties must be given time to respond as part of the Hearing Record.

The Task Force discussed comments relating to Section 10131 of the draft APA Legislation regarding determining what sort of agencies and/or licenses should be subject to a Formal Hearing. The Task Force agreed that additional discussions are required before a determination can be made.

The Task Force discussed comments relating to Section 10141 of the draft APA Legislation regarding the difference from the existing APA. The Task Force agreed that the section should be revised to incorporate language to avoid possibilities of technical violations.

The Task Force discussed comments relating to Section 10142 of the draft APA Legislation regarding the potential need to further revise the judicial standard of review for Case Decisions. The Task Force agreed that due to the absence of some Task Force members, further discussion of the comments relating to the standard of should be tabled until the next meeting of the Task Force.

The Task Force discussed the potential of adding language into the draft APA Legislation providing an explicit preference in favor of negotiated settlements, in an effort to help resolve some cases.

The Task Force agreed that a revised version of the draft APA Legislation would be created, incorporating the discussions during the meeting, and circulated to the Task Force for further review and comment.

V. Schedule Upcoming Meetings:

Next task force meeting is scheduled for January 26, 2018 at 9:30 a.m. meeting in Wilmington. The meeting will be held at the offices of Morris, Nichols, Arsht & Tunnell LLP.

VI. Public Comment:

None.

VII. Adjournment:

There being no further business, the meeting adjourned at 12:05 P.M.

 co chair